IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 46

MAURICE A. HUTCHESON, *Petitioner*,

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR REHEARING

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PETITION FOR REHEARING

Now comes MAURICE A. HUTCHESON, petitioner herein, and respectfully prays the Court to grant a rehearing, for the sole reason that the indictment herein is invalid in precisely the same respects as the indictments considered in *Russell* v. *United States*, No. 8, and related cases, decided May 21, 1962, and that accordingly Rule 12(b)(2) of the Federal Rules of

Criminal Procedure now requires this Court to enter a judgment of reversal in the present cause.

First. Exactly one week after the decision in the present contempt-of-Congress case, involving a violation of 2 U.S.C. § 192, this Court in a sextet of similar cases (*Russell* v. *United States*, No. 8, together with Nos. 9-12 and 128) ordered the latter convictions reversed because of the invalidity of the several indictments there considered, which did not identify the subject that was under inquiry by the cognizant Congressional committee at the time of each defendant's default or refusal to answer.

The identical deficiency appears in the present case.[1] As in *Russell*, the indictment here contains (R. 4) the generalized allegation that petitioner "was asked questions which were pertinent to the question then under inquiry." But, again as in *Russell*, the indictment here at no point (R. 4-7) identified in any way the subject that was under inquiry at the time of this petitioner's refusal to answer the 18 questions that were made the subject of the 18 counts on which he was and now stands convicted.

Second. It is true that the issue on which *Russell* v. *United States* and companion cases ultimately turned was not advanced in the present case, either in the District Court, or before the Court of Appeals, or before the Court (Pet. Cert. 2-3; Pet. Br. 2). But we think that in the present posture of the instant case this difference is not and should not be determinative.

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[1] This identity indeed is duly noted in the dissenting opinion of Harlan and Clark, JJ., in the *Russell* case, p. 3 of slip opinion, note 2.

Rule 54(a)(1) of the Federal Rules of Criminal Procedure makes those Rules applicable here,[2] and Criminal Rule 12(b)(2) specifically provides that

> "the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding."

Here, since the judgment of this Court has not yet gone down to the court below, see Rules 59(2) and (3) of this Court, the present case is of course still pending here.

In compliance with the command of Rule 12(b)(2), F.R. Crim. P., courts of appeals have reversed convictions because of invalid indictments where no objection in that behalf was made in the district court, *United States* v. *Manuszak*, 234 F. 2d 421, 422 (C.A. 3), and also where the objection was first made by petition for rehearing following initial affirmance on appeal. *Hotch* v. *United States*, 208 F. 2d 244, 249 (C.A. 9), prosecution's subsequent petition for rehearing denied, 212 F. 2d 280.

Since, under the decision in *Russell* v. *United States*, the present indictment, which similarly did not allege the subject matter under inquiry at the time petitioner refused to answer, therefore in like manner did not charge an offense, this Court is bound, under the "shall be noticed" language of Rule 12(b)(2), F.R. Crim. P., to give effect in this case to its subsequently announced *Russell* decision.

Third. While we think that this result must follow under the terms of Criminal Rule 12(b)(2), the invalidity of the present indictment amounts in any

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[2] "These rules apply to all criminal proceedings in the United States District Courts, • • •; in the United States Courts of Appeals; and in the Supreme Court of the United States; • • •."

event to plain error of a fundamental nature affecting substantial rights, so that the same consequence would follow under the optional rules governing other defects first noticed on appeal.

Rule 52(b), F. R. Crim. P., is as follows:

> "(b) **Plain Error.** Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

And Rule 40(1)(d)(2) of this Court provides that "the court, at its option, may notice a plain error not presented." A similar provision has been a part of this Court's Rules for over 90 years,[8] and the Court has accordingly consistently held that it will notice fundamental errors even though not assigned or specified. See *Brotherhood of Carpenters* v. *United States*, 330 U.S. 395, 411-412, citing many cases; *Fisher* v. *United States*, 328 U.S. 463, 467-468.

The case of *Edward F. Zap*, decided some years back (No. 489, Oct. T. 1945), is instructive in this connection. Certiorari was granted, limited to search-and-seizure issues, 326 U.S. 802, following which, on the last day of the 1945 Term, the judgment of conviction was affirmed. *Zap* v. *United States*, 328 U.S. 624. A petition for rehearing filed on June 29, 1946, and a "Supplemental Petition for Rehearing," filed on July 5, were severally denied. 329 U.S. 824; J. Sup. Ct., Oct. T. 1946, p. 45 ("petitions").

Thereafter, following this Court's decision in *Ballard* v. *United States*, 329 U.S. 187, which ordered dis-

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[8] Rule 27(6), 306 U.S. at 708; Rule 27(4), 286 U.S. at 615 and 275 U.S. at 615; Rule 25(4), 266 U.S. at 672-673; Rule 21(4), App. 27 to 222 U.S., 210 U.S. at 488, and 108 U.S. at 573; Rule 21(8), 14 Wall. xii and 11 Wall. x (May 1, 1871).

missed an indictment against a mother and her son because of the systematic exclusion of women from the indicting grand jury, Zap filed a "Second Petition for Rehearing and for Recall of Mandate," relying on the *Ballard* decision. Despite articulated objection by the Acting Solicitor General, who had been called on for a response,[4] this Court on his second—actually third—petition for rehearing, granted Zap the relief for which he had prayed, and directed dismissal of the indictment against him. 330 U.S. 800.[5]

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[4] See Memorandum for the United States, pp. 5, 12-13:

"This case differs from the *Ballard* case in that here a man alone was the defendant.

* * * * *

"On January 7, 1946, this Court in effect denied certiorari on the woman jury point when it limited the grant of certiorari to the question of the admissibility of the books and records. No request for an enlargement of the grant was made, either within 25 days of January 7, 1946, or before the argument of the case on February 4 and 5, 1946, or, indeed, at any time during the 1945 Term. This Court's limited grant did not preclude it from enlarging the grant and giving consideration to other questions presented by the record which it thought necessary or proper to decide. It would seem that under the circumstances of this case the woman jury point should be considered as having been finally disposed of on January 7, 1946, and that, in consequence, power to consider this point could not be revived by an application filed after the term."

[5] The order read:

"*Per Curiam:* The motion for leave to file a second petition for rehearing and to recall the mandate is granted. The second petition for rehearing is granted and the judgment entered June 10, 1946, 328 U.S. 624, and order denying rehearing entered October 21, 1946, 329 U.S. 824, are vacated. The judgment of the Circuit Court of Appeals is reversed and the case is remanded to the District Court with directions to dismiss the indictment. *Ballard* v. *United States*, 329 U.S. 187. THE CHIEF JUSTICE and MR. JUSTICE JACKSON took no part in the consideration or decision of this application."

The present case is certainly not weaker substantively than that of *Zap*, for here there is very plainly present the identical deficiency that rendered invalid the indictment of *Russell et als.* Nor, we submit, is there any substantial procedural difference, inasmuch as when Zap petitioned for rehearing of the original order denying certiorari in his case (326 U.S. 777), he did not press the woman jury point that he had made below and in his original petition for certiorari (Pet. 20, Question 7). See his Petition for Rehearing, filed January 2, 1946, following order of December 11, 1945 (326 U.S. 692), a petition which was granted on January 7, 1946, when the Court granted certiorari on the books-and-records point (326 U.S. 802).

Thus Zap's conviction was ultimately reversed here on the strength of a supervening decision on an issue that he had all but formally abandoned in this Court.

Fourth. Whether the Court proceeds here under the mandatory terms of Criminal Rule 12(b)(2) or under the discretionary formulations of Criminal Rule 52(b) and of its own Rule 40(1)(d)(2) is perhaps less important than that it grant this petitioner the relief he now seeks. For, very plainly, it would be inconsistent with the even-handed administration of justice to send this petitioner to jail on the 14th of May after conviction on an indictment that was invalid in precisely the same respect as those on which *Russell* and five others went free on the 21st of May.

Accordingly, we urge that this petition for a rehearing should be granted, that the judgment heretofore entered in the above-entitled cause should be vacated, and that a judgment should now issue reversing the

judgment below on the authority of *Russell* v. *United States*, No. 8, decided May 21, 1962.

Respectfully submitted.

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CERTIFICATE OF COUNSEL

I certify that this petition is presented in good faith and not for delay.

FREDERICK BERNAYS WIENER

JUNE 1962.